IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF AMERATIONAL TRUST AND SAVINGS ASSOCIATION, DAVID LZNICK and CHARLES H. SACHS, Executors,

Petitioners,

vs.

SIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS.

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CASES

STATUTES

TEXTBOOKS

No. 12980.

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dent contends:

at as to non-insurance assets the case is within 11(c), I. R. C., because of income allegedly re- or his life or any period not ending before his Joint Resolution of March 3, 1931, quoted Pet. App. p. 1).

at as to insurance assets the same rule applies of the provision for cancellation of the policies ng the cash surrender values to corpus [Ex. 1-A, Tr. 62].

4. That as to the insurance assets the case Section 811(g) because of "incidents of owne legedly retained.

To reply point by point to respondent's conten require an unnecessary and unwelcome repetiti argument in chief. We shall limit to salient discussion which follows:

Points 1 and 2. Section 811(c). It may parties to *Hassett v. Welch* agreed and the (p. 307 of 303 U. S.), that the 1932 amendment Br., App. p. 1) "reenacted the substance of Resolution with but slight verbal differences." Court was not called on in that case to dete scope or effect of those "slight verbal differenc question was whether the 1931 and 1932 legis retroactive. The result and the reasoning by wh reached would have been the same had the 193 ment not been enacted. Indeed (p. 313 of 30 the Court notes the Treasury's inconsistency i the 1932 amendment as retroactive, while trea rectly, the Court thinks—the 1931 Joint Res non-retroactive.

We suggest that in the present case the g is exhibiting a little of the same reluctance to ing the 1932 amendment as effecting a change that it exhibited some fourteen years ago in *Welch*. That this amendment covered new gr it closed what both the Treasury and Congres was a "loophole" in the law, is shown by the c our opening brief (pp. 12-13) and the Append

3, page 7 of the Appendix to our opening brief
ed to the pre-March 8, 1951 version of Reg. 105,
1.18.[1] It will be a convenience to the Court to
relevant part of the pertinent regulation as it
ıe time of Selznick's death in 1944.

tion 81.18. Transfers with possession or en-
ent retained. Except in the case of a bona fide
for an adequate and full consideration in money
oney's worth, the gross estate embraces (section
c)) all property transferred by the decedent,
her in trust or otherwise, if he retained or re-
d the use, possession, right to the income, or other
yment of the transferred property, and if the
fer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1952, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

ıg is subsection (b) of the present Section 81.18, quoted
of the Appendix to our opening brief:
tates of decedents dying before January 1, 1950. In
a decedent who died before January 1, 1950, property
e included in the gross estate under this section unless
—

A reservation for a 'period not ascertaina
out reference to his death' may be illustra
resolution of the right to receive, in quar
ments, the income of the transferred prope
none of the income between the last quar
ment and decedent's death was to be re
him or his estate; or by a reservation of a
following a precedent estate for life or a
years." (See T. D. 4868, 1938-2, C. B.
amended by T. D. 5741, 1949-2, C. B. 1
duced in C. C. H. Federal Estate & Gift
porter, ¶1460.01.)

Exactly the same differentiation between pre-June 6, 1932 transfers was made in the pre-1951 version of Section 81.19, in effect at the Selznick's death, relating to transfers with right to designate who shall possess or enjoy. (C. B. as *supra*; C. C. H. Federal Estate & Gift Tax ¶1470.01.)

Point 3. Section 811(d). Respondent says 21):

"* * * Here the settler had the powe
resent himself and the beneficiaries in petitio
court of competent jurisdiction at any time
the trust, provided, however, that no ar
should make it revocable. It seems clear
power would have justified any amendmen
by the settlor short of actually revoking
(see Restatement, Trusts (1935), Section
therefore the property is taxable under
811(d)."

eated on page 21) that "the settlor had the represent himself and the beneficiaries in peti- y court of competent jurisdiction at any time the trust" is not clear to us. The trust [Tr. y gives the trustor the right "to petition any competent jurisdiction * * * to amend nstrue." This does not give, it does not purport ny right to proceed *ex parte*. The "petition," e assumed, would have to follow regular and procedure. That procedure would require that iaries be made parties.

ifornia law is clear. In *Mitau v. Roddan,* 149 Pac. 145 (1906), a trust case, the court says

* * It is the general rule in equity, con- in force by the provisions of the Code of Procedure (sec. 389), that all who are inter- in the subject-matter of a litigation should be parties thereto, in order that complete justice be done, and that there may be a final determina- f the rights of all parties interested in the sub- matter of the controversy."

s v. Security Trust & Savings Bank, 208 Cal. Pac. 1026 (1929). The court says (p. 467):

* * It is manifest that in a controversy by ettler with the other settler and/or beneficiaries, ustee is in no sense the representative of either n. A trustee is given by statute the right to n execution of the powers conferred without g beneficiaries as plaintiffs, but this applies

The same rule applies where the purpose of
tion" is "to amend and/or construe."

Other California cases on the necessity of j
beneficiaries in suits where the relations *inter*
tlor, trustee or beneficiaries are involved ar
Dowd, 207 Cal. 290, 277 Pac. 1047 (1929);
Bank of California, 19 Cal. App. 2d 579, 65 I
(1937); *De Olazabal v. Mix,* 24 Cal. App. 2d
2d 787 (1937).

In *Carey v. Brown,* 92 U. S. 171, 23 L
(1875), the court says (p. 172):

> "The general rule is, that in suits respe
> property, brought either by or against th
> the *cestuis que* trust as well as the trustee
> essary parties. Story, Eq. Pl., sec. 207."

The court then enumerates certain exceptio
rule which are not material here.

Selznick, in reserving the power to petitio
"to amend and/or construe" the trust, did not
write a new code of procedure for himself, or
as to himself, long settled procedural requiren
would have been pulling at his bootstraps if
tempted to do so.

Point 4. Section 811(g). Insurance assets.
tended (Resp. Br. pp. 23-28) that the change i
assets which would result from surrender of the
this in turn resulting in Selznick's receiving
therefrom—is an "incident of ownership." N

'e ask the Court's indulgence in breaking up this into its component parts.

Right to economic benefits. Selznick had no such except a right to income (if the policies were dered), which right, if we are correct in our contention on this appeal, is insufficient to the proceeds into the taxable estate.

nust be remembered that under the statute, the cant thing as to insurance purchased with prem- paid on or prior to January 10, 1941 [an item 48,805.10 here, and the only insurance item in e, see Tr. p. 41] is the retention of an incident nership. To surrender for cash (the insured ing the cash), to pledge for loans, to change eneficiaries, are plain cases. They are rights tenant to and inseparable from ownership.

s retention of income (assuming it was retained h manner as to impose tax liability at all, which not admit) fall into the same category? Obvi- rights to income can and do exist in innum- cases quite irrespective of "ownership" on the f the person receiving the income. An income ciary of a trust has a right to income, but does ecessarily or even ordinarily have any "owner- except that right.

tion 811(g) plainly contemplates an "owner- which attaches to the policy or its proceeds. etention of a right to income, even if the Court that right to have been effectively retained as

January 10, 1941 (Section 503(a), Rever
1950, Op. Br., App. pp. 5-6).

b. *Power to change the beneficiary.* Se
no such right.

c. *To surrender or cancel the policy.*
could surrender or cancel (the fact he ha
the consent of two other persons is not i
But the surrender or cancellation did not
proceeds to return to him or give him an
them which he did not have before.
irrevocably disposed of under the trust. T
tion is not to be construed in such a way
to doubtful or incongruous results. It is
cases where the insured, through surrend
in specie, immediate benefits as to which a
he had only a promise. That is not the situ

d. *To assign the policy.*

e. *To revoke an assignment.*

f. *To pledge the policy.*

g. *To obtain a loan against surrender*

Selznick had none of these rights.

The concluding sentence of the regulation
inapplicable.

We shall not review the cases cited by
(Br. p. 27) on this point. In all of them
elements of reversion (then important) or of c

new ground, and to predicate the essentials of
upon grounds which at best are shaky and
s, and which seem to us non-existent.

leference, we submit that the decision of the
t should be reversed in its entirety; and if this
lenied, that the minimum relief to which peti-
e entitled is the exclusion from taxability of
f the insurance purchased with premiums paid on
January 10, 1941.

Respectfully submitted,

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· 22, 1951.